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Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

Petition of the Wireless Consumers)	WT 99-263
Alliance for Declaratory Ruling)	

COMMENTS OF BELL ATLANTIC MOBILE, INC.

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Bell Atlantic Mobile, Inc. (BAM) opposes the July 16, 1999, "Petition for Declaratory Ruling" filed by the Wireless Consumers Alliance, Inc. (WCA), and requests that it be denied.¹

SUMMARY

WCA is one of the plaintiffs in an action pending in California state court against a cellular carrier serving the Los Angeles market. The plaintiffs claim that promotional materials of Los Angeles Cellular Telephone Company (LA Cellular) deceptively overstated the carrier's actual service area. While the California trial court allowed their complaint to proceed, it ruled that the damages plaintiffs were

¹ Public Notice, "Commission Seeks Comment on Petition of the Wireless Consumers Alliance, Inc. for a Declaratory Ruling on Communications Act Provisions and FCC Jurisdiction Regarding Preemption of State Courts from Awarding Monetary Damages Against Commercial Mobile Radio Service Providers for Violation of Consumer Protection or Other State Laws," WT 99-263 (released July 28, 1999).

seeking could not be awarded because calculating such damages would require the court to determine what charges LA Cellular was entitled to receive, and that Section 332(c)(3) of the Communications Act preempts that determination.² WCA requests that the Commission declare that Section 332(c)(3) does not preempt state courts from assessing monetary damages against CMRS providers that are judged to have engaged in unlawful business practices. WCA's request should be rejected on multiple grounds.

First, the Petition must be dismissed as defective because it is irretrievably vague and overbroad. It is not confined to the California litigation being prosecuted by WCA, and even says the facts of that litigation should not be considered. Instead WCA requests a sweeping ruling on the relationships among federal law, state law, and the courts in addressing an unlimited range of claims against an unlimited variety of practices by any and all wireless carriers. The Commission has held, however, that a preemption ruling must be based on specific facts, and it avoids broad, prospective rulings. This precedent compels denial of WCA's petition, particularly given the fact-intensive, case-by-case approach the Commission has followed in applying Section 332.

² This provision states in part that "no State or local government shall have any authority to regulate the entry or the rates charged by any commercial mobile service" 47 U.S.C. § 332(c)(3).

Second, WCA ignores a similar but more focused petition for declaratory ruling which has been awaiting Commission action since December 1997. That petition, filed by a wireless carrier, argued that specific practices were lawful and that claims for damages arising from those practices would also be preempted. The record supplied ample grounds to grant the requested relief. To date, however, the Commission has taken no action. It would be arbitrary and unjustified for the Commission to consider WCA's petition until after it decides the long-pending 1997 petition. If it decides to take up WCA's petition at all, it should first ask for further comments on the much earlier petition to refresh and update the record, and consolidate the two proceedings.

Third, to the extent the Commission decides to address the preemptive effect of Section 332 in response to WCA's petition, it should deny the petition because the California court's ruling was correct. A court cannot award monetary damages because they implicate a wireless carrier's rates. WCA and the other plaintiffs seek damages for the decreased value of the service they claim they actually received. A court could only calculate that decreased value by comparing what plaintiffs paid with what they "should" have paid. As the record in response to the 1997 petition shows, courts have held that calculating such damages constitutes rate regulation, because it requires them to determine what rates or revenues would have been reasonable or would have been recovered absent misconduct. This is precisely what Section 332 preempts.

Fourth, rejecting WCA's petition is particularly important because the underlying court action attacks a carrier's service coverage and technical quality. Issues as to mobile carriers' service adequacy or quality have long been preempted by this Commission. WCA's suit seeks to undercut the benefits of exclusive federal jurisdiction over these matters and improperly involve the courts in determining the quality of wireless service

Fifth, despite WCA's hyperbole, denying its petition will not immunize wireless carriers from liability or leave consumers without any remedies. The limited ruling by the California trial court correctly denied plaintiffs' right to receive specific damages if the carrier's practices are adjudged unlawful under California state law. Section 332 does *not* preclude a court from awarding *other* remedies such as injunctive relief, nor did the California court deny plaintiffs such remedies. In addition, wireless carriers are common carriers holding radio licenses and are thus subject to the full range of federal remedies available under Titles II and III of the Act (although WCA has chosen to ignore those remedies and instead mount a class action in state court). Carriers in this competitive industry also have strong incentives to disclose fully and accurately their practices to their subscribers or risk losing them, and a recent Commission decision noted the lack of evidence that wireless consumers are not receiving accurate information from carriers.

The Commission should thus either dismiss WCA's petition as procedurally defective, or deny it on the merits.

I. WCA'S PETITION SHOULD BE DISMISSED BECAUSE IT ASKS FOR AN UNLIMITED, PROSPECTIVE PREEMPTION RULING.

Determining the preemptive effect of a provision of the Act is often a fact-intensive analysis that requires assessing conflicts between the Act and the state law or claim at issue or determining whether preemption is necessary to protect a federal objective. Because these matters require consideration of particular facts, the Commission generally refrains from making broad preemption rulings that are not tied to specific state laws or practices. Last week, for example, it held that it would not interpret Section 222 of the Act as preempting all state authority to adopt rules for the use of CPNI, but would instead “exercise our preemption authority on a case-by-case basis.” If a carrier believes a specific rule should be preempted, it should submit the rule for review “and we will then consider the specific circumstances at that time.”³ The Commission followed the same approach toward preemption of state E-911 requirements for wireless carriers, holding that it would not prospectively preempt but would consider a “specific state regulation” and “examine the need for specific preemption in the future on a case-by-case basis.”⁴

³ *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, Order on Reconsideration and Petitions for Forbearance*, CC Docket No. 96-115, FCC 99-223 (released September 3, 1999), at ¶¶ 113-114.

⁴ *Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, Report and Order and Further Notice of Proposed Rulemaking*, CC Docket No. 94-102, 11 FCC Rcd 18676 (1996).

The Commission has followed this case-by-case approach to determining the preemptive effect of Section 332. In its first decision implementing Section 332, it adopted a fact-specific framework for assessing state petitions to continue CMRS rate regulation pursuant to Section 332(c)(3)(B).⁵ In later denying such state petitions and preempting state CMRS regulations, it discussed the demarcation between state regulation of rates (which Section 332 preempts) and regulation of “terms and conditions” (which is not preempted). It emphasized that “establishing with particularity a demarcation between preempted rate regulation and retained state authority over terms and conditions requires a more fully developed record” than it had available, emphasizing the case-by-case nature of that determination.⁶

In applying its rule governing petitions for declaratory rulings,⁷ the Commission has similarly required petitioners to identify with specific facts the parties and practices at issue. It has rejected petitions for such rulings where the

⁵ *Implementation of Sections 3(n) and 332 of the Communications Act, Second Report and Order*, 9 FCC Rcd 1411, 1504-05 (1994).

⁶ *E.g., Petition of the People of the State of California and the Public Utilities Commission of the State of California to Retain Regulatory Authority over Intrastate Cellular Service Rates (“California Rate Petition”)*, PR Docket No. 94-105, 10 FCC Rcd 7486, 7549 (1995). The Commission has continued this fact-specific approach to applying Section 332. *See Pittencrief Communications, Inc.*, 13 FCC Rcd 1735, 1744 (1997) (ruling “continues our case-by-case determination of what matters come within the meaning of ‘other terms and conditions,’ as opposed to rate and entry regulation.”).

⁷ 47 C.F.R. § 1.2.

petitioner failed to submit such facts and instead sought a broad decision that would extend beyond a particular party or practice.⁸

WCA, however, asks for a ruling that conflicts with this precedent. It asserts that the Commission should address issues that go far beyond the California case. It asks the Commission to address not only the effect of Section 332 on the claims in that case but on claims against unspecified “business practices” by all other carriers nationwide. Petition at 1. The ruling would apply not only to the California case but will “aid in the disposition of significant litigation brought on behalf of millions of consumers of wireless telephone services in the State of California as well as in other states that *have not yet established* legal precedents.” *Id.* (emphasis in original). Further, it argues that this broad ruling “can be annunciated by the Commission without reference to the specific facts of any particular case.” *Id.* at 6.

WCA demands that the Commission address the relationship of Section 332 to claims brought against wireless carriers generally, in any state, involving any state statutory or common law – even where there is not even any controversy or litigation in other states. WCA would have the Commission second-guess courts in states that have not agreed with WCA’s position, even though it does not cite

⁸ See *Aeronautical Radio, Inc.*, 5 FCC Rcd 2516 (CCB 1990) (denying petition for declaratory ruling, because the petitioner failed to specify the carriers or practices that it believed were unlawful). Here, too, WCA seeks a ruling that would impact all wireless carriers operating in all states. Its petition should be denied for the same reason.

pertinent laws from these states. It fails to specify what state laws are at issue, what provisions of those laws might entitle a prevailing party to damages, and how damages would be calculated. Without that information, and given the unbridled scope of WCA's petition, there is no plausible basis on which the Commission could grant the petition.⁹

II. IF THE COMMISSION CONSIDERS WCA'S PETITION IT SHOULD FIRST DECIDE A 1997 PETITION FOR DECLARATORY RULING ON SECTION 332.

If the Commission considers WCA's broad petition at all, it should act on a long-pending petition for declaratory ruling concerning a cellular carrier's billing practices that has been pending for nearly two years. In late 1997, Southwestern Bell Mobile Systems (SBMS), at the request of a trial court hearing a class action brought against SBMS in Massachusetts, filed a petition for declaratory ruling. SBMS sought a declaration as to the lawfulness of its practice of "rounding up" cellular calls to the next minute. It also sought a ruling that Section 332 precludes seeking damages based on that practice because calculating damages would require

⁹ The Commission's Public Notice seeking comment on WCA's Petition underscores the unlimited scope of the Petition: "Commission Seeks Comment on Petition of the Wireless Consumers Alliance, Inc. for a Declaratory Ruling on Communications Act Provisions and FCC Jurisdiction Regarding Preemption of State Courts from Awarding Monetary Damages Against Commercial Mobile Radio Service Providers for Violation of Consumer Protection or Other State Laws." Which types of "violations" would be covered? Which "damages"? Which "state laws"?

the court to determine what the lawful charges would be, which would constitute preempted rate regulation.

In response to the Commission's call for comments on SBMS's petition,¹⁰ a large record was developed with detailed input from many parties, nearly all of whom supported SBMS's petition.¹¹ BAM's and Comcast's comments, for example, documented the growing abuse of the class action process to extract settlements. BAM cited academic research and other materials pointing to the harms of class actions generally and to the wireless industry in particular.¹²

¹⁰ Public Notice, "Wireless Telecommunications Bureau Seeks Comment on a Petition for a Declaratory Ruling Regarding the Just and Reasonable Nature of, and State Law Challenges to, Rates Charged by CMRS Providers When Charging for Incoming Calls and Charging for Calls in Whole-Minute Increments Filed by Southwestern Bell Mobile Systems," DA 97-2464 (released November 24, 1997).

¹¹ E.g., Comments of Comcast Cellular Communications (documenting abuses of class action process); Comments of United States Cellular Corporation, GTE Service Corporation, AT&T Wireless Services, Inc. and Century Cellunet, Inc., all filed December 24, 1997 (reviewing caselaw holding that damages awards constitute rate regulation). Although two law firms representing plaintiffs in other class actions opposed SBMS, WCA filed no opposition.

¹² Comments of Bell Atlantic Mobile, Inc., DA 97-2464, filed December 24, 1997. Class actions are often merely vehicles to place pressure on carriers to settle (with substantial attorneys' fees to class counsel).

One study of class actions in the Northern District of California concluded: "Class counsel, unrestrained by the codes of professional responsibility or monitoring by representatives, have a greatly enhanced role in these lawsuits, which they initiate, finance and for the most part control." Downs, "Federal Class Actions: Diminished Protection for the Class and the Case for Reform," 73 *Neb. L. Rev.* 646 (1994). For example, the lead plaintiff in a case brought against BAM is the *sister* of one of the attorneys filing the suit. Comments of Bell Atlantic Mobile, Inc., DA 97-2464, at 6.

To date, however, the Commission has taken no action. It would be arbitrary as well as unwarranted to take up WCA's unfocused petition seeking a declaration that would have nationwide impact, until after the Commission decides the long-pending 1997 SBMS petition and the concrete issues it presents. Given that the record on that petition was compiled 18 months ago, the Commission should ask for further comments to update that record, and should consolidate SBMS's petition with WCA's petition.

III. SECTION 332 PREEMPTS WCA'S DAMAGES CLAIMS.

A. The California Trial Court Correctly Held That Awarding Damages Would Require It To Determine What Charges Were Lawful.

Should the Commission decide to take up WCA's petition, it should deny the petition, because it asks for relief that the Act precludes. WCA wants a broad ruling that Section 332 *cannot* preempt claims of monetary damages against any wireless carriers for engaging in any business practices that are held to be unlawful. Section 332, however, clearly preempts damages claims which require a determination of what rates should have been charged or what value subscribers received for the services they paid for. That is what WCA's claims require.

These damages claims cannot be awarded without determining the difference between what rates the carrier charged and what rates it would have been entitled to charge absent the wrongful practice. This problem is apparent in WCA's own

complaint: Plaintiffs claim that they were deceived by LA Cellular's claims as to "seamless" coverage, and thus seek compensatory damages for being overcharged. Those damages would be measured by the difference between the value of the service they purchased (service without coverage gaps) and the value of the service they actually received (service with coverage gaps). The court would have to determine the rate that LA Cellular should have charged for the technical quality and geographic extent of cellular service that was actually provided, so that it could refund the difference. This, as the court correctly found, was rate regulation.

The same problem occurs with plaintiffs' demand that LA Cellular "disgorge" its profits, because the court would have to determine that the rate the carrier was entitled to receive was capped at its expenses without any profit. The California trial court correctly rejected this demand, recognizing that it would require a determination of what the "lawful" rate was for the quality of service that LA Cellular actually provided to the plaintiffs. The only way a court can impose a damage award involving "disgorgement" of revenues, as WCA's suit demands, is to determine what would be a "reasonable" amount of revenue that the carrier is entitled to retain, and that is unavoidably rate regulation.

B. The Court's Holding Is Consistent With Other Court Decisions Precluding Damages Awards.

The California trial court's ruling is in line with other precedent, including an appellate court ruling in California itself. Courts have held that calculating and awarding damages involving disgorgement of revenues, refunds or rebates

constitute rate regulation.¹³ It makes no legally cognizable difference how plaintiffs plead the basis for damages, because courts have found that calculating and awarding such damages is precisely the kind of rate regulation that they cannot engage in. They have adjudged claims for “fraudulent concealment” or “failure to disclose,” such as those made by WCA, as in reality demanding impermissible ratemaking.¹⁴ For example, the New York State Appellate Division has declared:

[W]ere lawsuits like this one (alleging concealment of the “rounding-up” of partial minutes of airtime) to be countenanced, consumers would be further penalized because utilities would be forced to raise their rates to cover the cost of potentially endless litigation brought by ‘eager lawyers, using the class action vehicle [to] circumvent the state[’s] rate-making mechanisms’.¹⁵

The Second Circuit agreed, specifically rejecting damages claims based on allegations that a carrier had fraudulently overcharged its customers, and noting why an award damages is “hopelessly intertwined” with rate regulation:

The plaintiffs respond that courts would not be required to determine a “reasonable” rate, but rather would only have to decide what damages arose from the fraud, a task courts routinely undertake. However, the two are hopelessly intertwined: “The fact that the remedy sought can be characterized as damages for fraud does not negate the fact that

¹³ It is settled law that a state court’s judgment constitutes “state” action. *Shelley v. Kraemer*, 334 U.S. 1 (1948). Nor does WCA dispute that the California court, just like a state public service commission, is subject to Section 332 and the remainder of the Communications Act.

¹⁴ See *AT&T Co. v. Central Office Telephone, Inc.*, 524 U.S. 214 (1998) (“Any claim for excessive rates can be couched as claim for inadequate services and vice versa.”).

¹⁵ *Porr v. NYNEX Corp.*, 660 N.Y.S.2d 440, 447 (2d Dep’t 1997).

the court would be determining the reasonableness of rates,” and that “any attempt to determine what part of the rate previously deemed reasonable was a result of the fraudulent acts would require determining what rate would have been deemed reasonable absent the fraudulent acts, and then finding the difference between the two.”¹⁶

Another federal court dismissed class action damages claims brought against Comcast, another cellular provider, finding that they were preempted by Section 332(c)(3).¹⁷ Again, plaintiffs sought to word their claim in terms of “fraud” by Comcast. Again, the court rejected the claim, branding it as “artful pleading,” and held that the “true gravamen of plaintiffs’ claim was a challenge to Comcast’s rates and billing practices.”¹⁸ It found that the “broad preemptive force of the Communications Act” barred plaintiffs’ damage claims, and that the Act’s goal of avoiding “a myriad of conflicting regulations” of carriers’ rates and billing practices would be undermined were class action plaintiffs permitted to seek damages for alleged fraud involving those practices:

The facts of this case provide a compelling demonstration of the necessity of a federal forum in order to ensure uniform regulation. Comcast does business not only in Pennsylvania but also in Delaware, Maryland and New Jersey. Virtually identical allegations to the ones contained in the complaint presently pending before this court were filed in state courts in Pennsylvania, Delaware and New Jersey creating the potential

¹⁶ *Wegoland, Ltd. v. NYNEX Corp.*, 27 F.3d 17 (2d Cir. 1994), *citing Wegoland, Ltd. v. NYNEX Corp.*, 806 F. Supp. 1112, 1119-21 (S.D.N.Y.1992).

¹⁷ *In Re Comcast Cellular Telecommunications Litigation*, 949 F. Supp. 1193 (E.D. Pa. 1996).

¹⁸ *Id.*, 949 F. Supp. at 1202-03.

for three radically different determinations of Comcast's obligations to its customers regarding its rates and billing practices. Thus, this court's determination that Plaintiffs' claims arise under federal law is entirely consistent with the stated policies and goals of the Communications Act.¹⁹

A California appellate court has reached the same conclusion, holding that if monetary restitution to plaintiffs in a case involving a telecommunications carrier's practices were to be granted, it "would enmesh the court in the rate-setting process."²⁰ The court stated that any such restitution of money would have to be based on a calculation of the "measureable loss" incurred, and that this would necessarily involve determining the charges that should have been imposed. The same logic applies to WCA's claim (as the trial court in that case has found).

Last year, a Pennsylvania state court reached the same result. It dismissed damages claims in a class action involving breach of contract, fraud and other charges, because it held that an award of monetary damages "would impermissibly conflict with the Federal Communications Act."²¹

The Seventh Circuit similarly held that a claim for damages against a cable system based on allegedly deceptive practices was barred because an award of damages would constitute rate regulation, and rate regulation had been preempted

¹⁹ *Id.*, 949 F. Supp. at 1204.

²⁰ *Day v. AT&T*, 63 Cal. App. 4th 325 (Cal.App. 1998).

²¹ *Pennsylvania Bancshares, Inc. v. Motorola, Inc.*, No. 95-19126 (Pa. Ct. Comm. Pleas, Oct. 27, 1998).

by federal law.²² Plaintiffs sought an order requiring Time Warner to disgorge the income it had earned through an alleged unfair trade practice, charging customers for “a la carte” program channels (just as WCA seeks disgorgement of LA Cellular’s revenues). But the court held that Time Warner’s “rate structure is a federal matter and state consumer laws that impact upon it conflict with the operation of the rate structure.” The court held that requiring disgorgement of the revenues earned under the disputed billing practice would constitute preempted rate regulation by the state:

Were the State to order Time Warner to turn over all of its receipts from the sale of the a la carte service, Time Warner essentially would have been required to provide the service for free. However, as noted above, the Cable Act prohibits the State from regulating the rates Time Warner charged for this service.²³

Other courts have dismissed damages claims because those claims cannot be distinguished from ratemaking.²⁴ In those cases, carriers’ tariffs prevented courts from intervening. WCA’s attempt to distinguish those cases as involving the “filed rate” doctrine completely misses the point. LA Cellular does not rely on the filed rate doctrine. Instead, it relies on the logic of these cases as to why calculating and

²² *Time Warner Cable v. Doyle*, 66 F.3d 867 (7th Cir. 1995).

²³ *Id.*, 66 F.3d at 881-82.

²⁴ *See H.J. Inc. v. Northwestern Bell Tele. Co.*, 954 F.2d 485, 493-94 (8th Cir. 1992); *Marcus v. AT&T Corp.*, 938 F. Supp. 1158, 1171 (S.D.N.Y. 1996); *Talton Telecomm. Corp. v. Coleman*, 665 So. 2d 914, 916 (Ala. 1995).

awarding damages constitutes rate regulation.²⁵ That logic equally applies to WCA's effort to obtain damages based on what LA Cellular was "entitled" to charge for its allegedly lower-quality service.

The pertinent issue is not what legal principle or law restricts judicial rate regulation; it is whether awarding damages is rate regulation – and on that issue the caselaw is quite clear. Regardless of the source of the legal restriction (for example, the filed rate doctrine, Section 332, or the cable provisions of the Act cited in *Time Warner*), courts have decided that calculating damages is entwined with determining the lawful rate, a determination that would constitute unlawful rate regulation.

Given Congress' explicit determination that state rate regulation be preempted, it would be a perverse result of Congress' action to allow state courts new power to regulate a wireless carriers' rates by awarding rebates or refunds in the form of damages. Wireless carriers, despite being freed by Congressional statute from rate regulation, would be subject to *more* court regulation than landline carriers, which continue to file tariffs, even though landline carriers generally still remain subject to rate regulation.

²⁵ That logic is solidly grounded in extensive precedent. As the Supreme Court has held, "regulations can be as effectively exerted through an award of damages as through some form of preventive relief." *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 247 (1959).

WCA points to several court decisions which have allowed class actions against wireless carriers to proceed. But most of those cases involve the entirely separate issue as to whether “removal” from state court to federal court would be proper.²⁶ The courts merely found that certain claims could be litigated under state law and that, under federal precedent on removal, removal was inappropriate given the lack of “complete preemption” of all claims. This is fully consistent with the California trial court’s decision to continue to hear WCA’s claims under state law. Those cases thus do not bear at all on WCA’s petition.

As to the few other cases WCA cites, it provides no facts about them, and thus supplies the Commission with no record on which to evaluate the courts’ decisions. Cases will likely be mixed given the fact-specific nature of civil litigation involving a variety of claims and applicable state laws. A court, like the California trial court hearing the WCA action, may conclude that, given the particular claims involved and the particular damages sought, it cannot grant such relief. WCA’s petition supplies the Commission with no grounds to grant its demand to declare that Section 332 cannot preclude damages awards regardless of the context.²⁷

²⁶ *E.g., DeCastro v. AWACS*, 935 F. Supp. 541 (D.N.J. 1994).

²⁷ Declaring that Section 332 cannot preempt damages claims would also undercut Section 202 of the Act, which prohibits price discrimination among customers. Awarding damages involving rebates or refunds would lead to a different effective rate being charged to some but not all customers, since not all customers will be able to recover damages for any alleged non-disclosure, but only those who relied on the non-disclosure in purchasing service.

(continued...)

IV. THE COMMISSION SHOULD REAFFIRM ITS EXCLUSIVE JURISDICTION OVER THE QUALITY OF WIRELESS SERVICE.

WCA's suit against LA Cellular has serious implications for the Commission's longstanding, exclusive role in regulating the quality of wireless service. Although cloaked in language of "concealment" and "fraud," the WCA action is in reality an attack on the adequacy of the carrier's service. The complaint requires the California court to evaluate the system's actual coverage and service quality and compare it to Los Angeles Cellular's promotional materials. Service quality is, however, a matter that the Commission considers to be its exclusive responsibility. Granting WCA's petition would undercut that policy and the important benefits that result from consistent federal oversight of the wireless industry.

The Commission's plenary jurisdiction over the quality of wireless service is well-settled. Since it created the cellular service in 1981, the Commission has not wavered from occupying the field. The law is thus clear that neither states nor courts may impose their own particular quality standards for cellular service. In 1981, the Commission addressed technical standards and asserted exclusive federal authority. It allowed no room for state regulation of service quality, finding that consistent technical standards were essential to allow cellular service to develop

(...continued)

Considering WCA's petition would require the Commission to attempt to reconcile any action with Section 202. It should not embark on that effort.

quickly on a national basis.²⁸ It also decided to limit technical requirements to allow competitive evolution of new technology, and found that any state-imposed requirements could frustrate these goals:

The technical standards set forth in this Report and Order are the minimum standards necessary to achieve the desired goals and any state licensing requirements adding to or conflicting with them could frustrate federal policy.²⁹

The Commission identified three purposes of technical standards: definition of cellular mobile radio, compatibility of operation, and “*maintenance of signal quality and other quality aspects of system performance.*”³⁰ It then set standards for cellular design, height and power limitations, equipment compatibility, and other matters. As for service quality, however, the Commission determined that the agency would not impose service quality standards upon the carriers – nor would it allow the states to do so. It asserted its *exclusive* jurisdiction over service quality:

A quality “comparable to landline” has been demonstrated as possible over the course of this proceeding. It does not appear necessary or desirable, however, for us to take the next step and impose a particular grade of service on cellular service consumers regardless of their willingness to pay for it. Setting quality standards could also have the detrimental effect of denying service to economically marginal markets. We favor allowing the interplay of market forces to determine the grade of service delivered.³¹

²⁸ *Cellular Communications Systems, Report and Order*, 86 FCC 2d 469 (1981).

²⁹ *Id.* at ¶ 82.

³⁰ *Id.* at ¶ 84 (emphasis supplied).

³¹ *Id.* at ¶ 95.

The Commission's long-standing policy of federal oversight of wireless service quality has not changed. In fact, Congress's mandate in the 1993 Budget Act for consistent federal oversight of the industry in areas in addition to service quality further shifted exclusive authority to the Commission from the states, making consistent federal regulation even more important.

Because WCA challenges the service quality of LA Cellular's system and seeks damages based on alleged representations about that service quality, the Commission should make clear that such claims are preempted. Were plaintiffs allowed to demand that courts decide what constitutes "acceptable" service or force carriers to modify their systems, the result would be a patchwork of state-by-state, or court-by-court, requirements, as courts embarked on the effort to measure and evaluate the quality of service. This would not only violate federal primacy over the wireless industry; it would also frustrate carriers' ability to provide seamless service based on one set of rules, in response to competitive forces and consumer needs.

V. DENYING WCA'S PETITION WILL NOT IMMUNIZE WIRELESS CARRIERS THAT ENGAGE IN WRONGFUL PRACTICES.

WCA summarizes its request as follow:

Generally, the Commission is requested to find and declare the [sic] CMRS providers are not endowed with a special status in the marketplace which shields them from state laws which regulate normal commercial practice by reason of the provisions of the Communications Act or the exercise of the Commission's jurisdiction.

Petition at ii. WCA repeatedly makes this assertion – that unless the Commission grants the requested declaratory ruling, wireless carriers will be immunized from penalties for unlawful practices. Nothing could be further from the truth. Denying WCA’s petition will not shield carriers or leave consumers without remedies.

At the outset, the apocalyptic way in which WCA frames its request misstates the actual matter decided by the California trial court. LA Cellular did not ask for “special status” to be “shielded” from state laws. It did not contest the court’s power to enforce state consumer protection laws against it or to adjudicate the case. It only sought (and the court agreed) to have monetary damages excluded, by showing why calculating such damages would necessarily involve the court in determining what a reasonable rate would have been. The court agreed that such damages calculation would necessarily involve rate regulation – precisely what Section 332 precludes. The correctness of that ruling is all that is on appeal to the California appellate court.

By asking the Commission not to look at the facts of its case, however, WCA is able to ignore the narrow issue that was decided by that court, and invite the Commission to take action that would have nationwide application, regardless of the states, state laws, or carrier practices involved. As explained in Section I of BAM’s Comments, the Commission must decline that invitation.

In any event, WCA is simply wrong that wireless carriers are shielded from liability by Section 332. First, Section 332 does not preclude courts from awarding a

wide range of relief to plaintiffs who prove unlawful conduct, including injunctive relief. Section 332 also does not preclude a state attorney general, public service commission or other agency from seeking to stop carrier practices that they believe violate state consumer protection or unfair trade practice laws. To the contrary, it preserves state regulation of “terms and conditions,” which, as the Commission has pointed out, may include consumer protection matters.³² The presence of such laws and agencies empowered to enforce them in virtually every state serve as a strong disincentive for carriers to attempt to engage in unlawful conduct.³³ Denying WCA’s petition will not undercut the authority of state utilities commissions to protect subscribers.³⁴

³² See *California Rate Petition*, *supra* n. 6, at 7449-50.

³³ The Commission has emphasized that removal of rate regulation authority from the California Public Utilities Commission (and other state agencies) does not preclude consumer protection-type actions against wireless providers. “Although the CPUC may not prescribe or fix rates in the future because it has lost authority to regulate “the rate charged” for CMRS, it does not follow that its complaint authority under state law is entirely circumscribed. Complaint proceedings may concern carrier practices, separate and apart from their rates. . . . Moreover, nothing in OBRA indicates that Congress intended to circumscribe a state’s traditional authority to monitor commercial activities within its borders.” *California Rate Petition*, *supra* n. 6, at 7550.

³⁴ What state commissions (and courts) cannot do is to order a wireless carrier to rebate revenues or calculate its rates for the benefit of a particular class of customers. As the record in response to SBMS’s petition showed, such damages awards cannot be separated from unlawful regulation of a carrier’s decision as to what services to charge for and how much to charge.

Second, because wireless carriers are regulated by this Commission as common carriers, they are subject to the fundamental duty imposed by Section 201 of the Act not to engage in unjust or unreasonable practices. In fact, Section 332 expresses a clear choice by Congress that the CMRS industry is to be regulated primarily at a federal level because of the inherently interstate nature of mobile radio service and the importance of deploying a nationwide infrastructure and competitive market that are not burdened or distorted by state-by-state regulation.³⁵ WCA's action seeks to undercut the Commission's mandate to oversee the industry and to rely on Section 201 and other Commission policies to ensure that wireless practices are just and reasonable. All carriers are also subject to the full range of sanctions available under the remedial provisions of Title II of the Act, including forfeitures and damages.³⁶ And, because wireless carriers are also

³⁵ See *California Rate Petition*, *supra* n. 6, at 7496-7499; *Connecticut Dep't of Public Utility Control v. FCC*, 78 F.3d 842, 845-46 (2d Cir. 1996) (discussing importance of federal as opposed to state regulation in avoiding conflicting and "balkanized" regulation); Kennedy, "Section 332 of the Communications Act of 1934: A Federal Regulatory Framework that is 'Hog Tight, Horse High, and Bull Strong,'" 50 *Fed. Comm. L. J.* 547, 559 (1998) ("Congress explicitly bestowed nationwide authority on the FCC to regulate the mobile service industry that Congress found to be inherently interstate.").

³⁶ In fact the Commission recently held that "a carrier's provision of misleading or deceptive billing information is an unjust and unreasonable practice in violation of Section 201(b) of the Act." *Truth-in-Billing and Billing Format, First Report and Order and Further Notice of Proposed Rulemaking*, CC Docket No. 98-170, FCC 99-72 (released May 11, 1999), at ¶ 24.

Notably, WCA has not (to BAM's knowledge) sought to invoke any of the many remedies that are available to it under the Communications Act.

regulated under Title III as radio licensees, they are also subject to still other sanctions including license revocations, conditional renewals and other penalties.

Third, wireless consumers can and do take advantage of alternative dispute resolution methods. For example, specific “Wireless Industry Arbitration Rules” were adopted in 1996 by the American Arbitration Association. They offer many wireless consumers with a convenient, faster and less expensive forum in which to resolve billing and service problems than litigation.

It is also important to keep in mind the vigorous competitive forces that are the reality in the CMRS industry today.³⁷ They encourage carriers to fully and accurately apprise customers of the basis for the charges they pay and the service they receive in return, or else risk losing customers to competitors. Evidence pointing to the wireless industry’s success in providing customers with clear and complete information about services is already before the Commission in its “truth-in-billing” proceeding. There the Commission recently decided that CMRS providers should *not* be subject to most of the “truth-in-billing” rules that were adopted for other carriers because of the lack of a record of problems. “Nor does the record indicate,” the Commission stated, “that CMRS billing practices fail to provide consumers with the clear and non-misleading information they need to make

³⁷ *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services, Fourth Report, FCC 99-136* (released June 24, 1999).

informed choices.”³⁸ That proceeding further confirms the benefits of the clear incentives carriers have in this very competitive industry to fully disclose their practices to their subscribers.

CONCLUSION

For the reasons set forth herein, WCA's petition for declaratory ruling should be dismissed as defective or denied on the merits.

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Dated: September 10, 1999

³⁸ *Truth-in-Billing Order*, *supra* n. 36, at ¶ 16.

CERTIFICATE OF SERVICE

I hereby certify that I have this 10th day of September caused a copy of the foregoing "Comments of Bell Atlantic Mobile, Inc." to be sent by first-class mail, postage prepaid, to the following:

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